NO. 09-35818

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,

Plaintiffs/Appellees,

v.

SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Defendants/Appellants.

On Appeal From The United States District Court
District Of Washington, At Tacoma

No. C09-5456BHS
The Honorable Benjamin H. Settle
United States District Court Judge

BRIEF OF APPELLANTS

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I. STATEMENT OF JURISDICTION

The District Court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983, because the Plaintiffs' claims were based on the First Amendment of the United States Constitution. The District Court filed the Order Granting Plaintiffs' Motion for Preliminary Injunction September 10, 2009. Appellants filed their Preliminary Injunction Appeal the next day, September 11, 2009. The Court of Appeals has jurisdiction under 28 U.S.C. § 1292(a)(1), because a preliminary injunction is an interlocutory order that may be appealed. The appeal was timely filed under Fed. R. App. P. 4(a)(1).

II. STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

1. Under the Washington Constitution, a referendum may be ordered on a bill passed by the legislature, if a specified percentage of legal voters call for an election. The laws governing referendums require voters to sign a petition and provide their names, addresses, and counties of residence so that the State can verify that the signers are registered voters. Does Washington's Public Records Act, which makes referendum petitions available for public inspection but does not require any voter to sign a petition, violate petition signers' First Amendment right to anonymous speech?

2. Referendum 71 had about 122,000 valid signatures and calls for an election on a bill that expands the rights, responsibilities, and obligations accorded state-registered same-sex and senior domestic partners. Do the Referendum 71 petition signers, who support a traditional definition of marriage, constitute a small vulnerable group that will be subject to threats, reprisal, and harassment, in violation of their First Amendment right of association, if their names are disclosed to the public?

Both of these issues were raised in the Plaintiffs' Verified Complaint For Declaratory and Injunctive Relief and the Motion For Temporary Restraining Order and Injunctive Relief. ER 475-76, 479-80.

The standard of review of the District Court's grant of a preliminary injunction is abuse of discretion. *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 901 (9th Cir. 2007). A preliminary injunction based on an erroneous legal standard or clearly erroneous factual findings is an abuse of discretion. *Id.* at 901 (citing *Clear Channel Outdoor, Inc. v. City of Los Angeles*, 340 F.3d 810, 813 (9th Cir. 2003)); *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120-21 (9th Cir. 2006); *see also Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 973 (9th Cir. 1991) ("The use of an erroneous legal standard, the

misapplication of law or a clearly erroneous finding of fact may serve as grounds for reversal").

III. STATEMENT OF THE CASE

Under the Washington Constitution, a referendum may be ordered on a bill passed by the legislature, if a specified percentage of legal voters call for an election. The laws governing referendums require voters to sign a petition and provide their names, addresses, and counties of residence so that the State can verify that the signers are legal voters. Washington's Public Records Act makes referendum petitions available for public inspection and copying.

The Sponsors of Referendum 71 brought this action seeking declaratory and injunctive relief alleging that Washington's Public Records Act violated their First Amendment rights. The Sponsors also sought a preliminary injunction, which was granted on September 10, 2009. The injunction prohibited the State from disclosing any referendum petitions.

IV. STATEMENT OF FACTS

A. Washington's Referendum Process

In the state of Washington, laws may be enacted in either of two ways: through the acts of the state's elected legislature, or directly by the people through the use of the initiative and referendum powers. Under the state

constitution, a referendum "may be ordered on any act, bill, law, or any part thereof passed by the legislature" with exceptions not at issue in this case. Wash. Const. art. II, § 1(b). If constitutionally established prerequisites for a referendum election are met, then the electorate votes on whether to accept or reject the bill passed by the legislature. *Id*.

In order to trigger the referendum process, the state constitution requires the filing of petitions that contain the valid signatures of Washington registered voters in a number equal to four percent of the votes cast for the Office of Governor at the last gubernatorial election preceding the filing of a referendum. Under the required form, the voters who sign a referendum petition "respectfully order and direct that Referendum Measure No. . . . , filed to revoke a (or part or parts of a) bill that (concise statement required by [Wash. Rev. Code §] 29A.36.071) and that was passed by the . . . legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection" in an election. Wash. Rev. Code § 29A.72.130. The referendum "petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote." *Id*. In signing the petition, the law requires voters to declare that: "I have personally

signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once." *Id*. Each petition must also contain a warning that: "[e]very person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both." Wash. Rev. Code § 29A.72.140. Each petition "must consist of not more than one sheet with numbered lines for not more than twenty signatures[.]" Wash. Rev. Code § 29A.72.100.

Referendum petitions are filed with the Washington Secretary of State who is required "to verify and canvass the names of the legal voters on the petition." Wash. Rev. Code § 29A.72.230. "The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure[.]" *Id*. The observers are prohibited from making a record of the information on the petitions. *Id*.

Anyone can challenge the Secretary of State's decision in court. Wash. Rev. Code § 29A.72.240 provides that: "*Any citizen dissatisfied with the determination of the secretary* of state that [a referendum] contains or does not

contain the requisite number of signatures of legal voters" *may appeal to the superior court* and seek a writ of mandate to compel certification or an injunction to prevent certification of the measure to the ballot. (Emphasis added.)

B. Washington's Public Records Act

Washington also has a Public Records Act (the Act). The Act originally was enacted by the people, through an initiative, Initiative Measure No. 276, approved November 7, 1972. 1973 Wash. Sess. Laws page nos. 1-31. It reflects the intent of Washington's citizens to maintain control of their government by ensuring broad access to records relating to its conduct and performance of its functions. Wash. Rev. Code § 42.56.010(2); .030.

The Public Records Act requires state agencies to "make available for public inspection and copying all public records, unless the record falls within [a] specific exemption[.]" Wash. Rev. Code § 42.56.070. The term "public record" is defined as "any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency." Wash. Rev. Code § 42.56.010(2). Referendum petitions filed with the Secretary of State meet this definition, as they must be submitted to the State, and are used by the State to determine whether a referendum petition is

supported by the requisite number of valid signatures of Washington voters to qualify the measure to the ballot. Although the Act exempts a number of specific categories of records from public disclosure (*see, e.g.*, Wash. Rev. Code §§ 42.56.210-.480), none of the exemptions apply to referendum petitions.

C. Referendum 71 Petitions

In 2007, the Washington Legislature created state registered domestic partnerships. 2007 Wash. Sess. Laws page nos. 616-37. A domestic partnership may be formed when "both persons are members of the same sex; or (b) at least one of the persons is sixty-two years of age or older." Wash. Rev. Code § 26.60.030. The 2007 law gave registered partners certain rights and responsibilities. In 2009, the legislature enacted Engrossed Second Substitute Senate Bill (E2SSB) 5688, which expanded the rights, responsibilities, and obligations accorded state registered same-sex and senior domestic partners.

In May 2009, Protect Marriage Washington began gathering petition signatures for a referendum election on E2SSB 5688. As required by Wash. Rev. Code § 29A.72.130, the signers of Referendum 71 "order and direct that Referendum Measure No. 71 . . . shall be referred to the people of the state for

their approval or rejection at the regular election to be held on the 3rd day of November, 2009" and each of the signers certified that "I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once." ER 066. The Referendum 71 petitions each contained the maximum 20 lines for signatures. ER 068-069.

Signature gathering took place in public places such as at Wal-Mart and Target stores. ER 025, 034-035. Typically, the signature gatherer sets up a table and asks members of the public walking by to sign the measure. ER 025, 034-035. There is also interaction between members of the public about whether the petitions should be signed. ER 025, 034-035.

On July 25, 2009, the proponents of Referendum 71 submitted their signature petitions. The signatures were delivered in an open, public forum and referendum supporters and opponents were in attendance, as were several members of the news media. ER 078-079. The petition sheets were counted at that time and the Secretary of State's Office began the task of verifying the signatures. The Secretary of State subsequently concluded that Referendum 71

had about 122,000 valid signatures, and certified the measure to the November 3, 2009, general election ballot.[1]

During the signature-gathering process, the website of WhoSigned.org announced that it would file a public records request to obtain the Referendum 71 petitions and post the information from the petitions on the internet. ER 100-101. The Secretary of State subsequently received four requests for the Referendum 71 petitions. ER 079. The Secretary of State's Office considers initiative and referendum petitions filed with the office to be public records. ER 079. In recent years, the Secretary of State has provided requesters with the petitions of five different initiatives. ER 080.

D. Proceedings In The District Court

On July 28, 2009, Protect Marriage Washington and two John Doe Plaintiffs (Sponsors) filed this action in federal district court. ER 466. The Sponsors alleged that the Public Records Act violated their First Amendment rights, sought a declaration that the Public Records Act was unconstitutional,

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[1] When the Secretary of State filed his response to the motion for preliminary injunction, he knew that the Sponsors of Referendum 71 had submitted 9,359 petition sheets. ER 078. He subsequently determined that there were about 122,000 valid signatures. *See* http://wei.secstate.wa.gov/osos/en/initiativesReferenda/documents/R-71%20certification.pdf (visited Sept. 18, 2009).

and asked for a permanent injunction. The Sponsors advanced two claims. First, the Sponsors brought a facial challenge that disclosing the petitions, which contained signers' names and addresses, would violate the signers' First Amendment right to anonymous speech. ER 475. Second, the Sponsors brought an as-applied challenge providing that Referendum 71 petitions under this Act would violate the petition signers' First Amendment right of association because disclosure would subject them to threats, reprisals, and harassment. ER 475.

When the Sponsors filed their Complaint, they also moved for a temporary restraining order and a preliminary injunction. On July 29, 2009, the District Court granted the motion for a temporary restraining order. A hearing on the motion for a preliminary injunction was held on September 3, 2009. On September 10, 2009, the District Court granted the Sponsors' motion for a preliminary injunction. ER-001. The Court ruled that the Sponsors were likely to prevail on their claim that the Public Records Act violated the Sponsors' right to anonymous speech. ER 008-016. Based on this conclusion, the District Court ruled that the Sponsors were entitled to a presumption that they would be irreparably harmed absent preliminary relief. ER 016. The Court ruled that the balance of equities and the public interest weighed in favor

of the Sponsors. ER 016-017. The District Court did not reach the Sponsors' as-applied claim. ER 016.

On September 11, 2009, the Secretary of State (the Secretary) filed this Preliminary Injunction Appeal. On September 14, 2009, the Secretary filed an emergency motion seeking a stay of the preliminary injunction. If the stay was denied, the Secretary sought expedited treatment so the appeal could be resolved before the November 3, 2009, election on Referendum 71.

V. SUMMARY OF ARGUMENT

The District Court's Order Granting Plaintiffs' Motion for Preliminary Injunction prohibiting release of signed referendum petitions pursuant to Washington's Public Records Act is based on fundamental errors in analyzing the Sponsors' First Amendment claim that the Public Records Act compels disclosure of anonymous political speech. The preliminary injunction rests solely on the District Court's conclusion that signed referendum petitions constitute anonymous political speech, and that accordingly, Washington's Public Records Act compels disclosure of anonymous speech.

The Public Records Act did not compel anyone to sign Referendum 71. The Washington Constitution and the statutes governing the referendum process, which the Sponsors do not challenge, compelled the voters who

wanted an election on Referendum 71, to sign the petitions and provide their names and addresses. The petitions must be submitted to the State to determine if there are enough valid signatures to require an election. Signing a referendum petition is not anonymous speech because the petitions are submitted to the State. In addition, voters signing a petition also disclose their names and addresses to the sponsor, signature gatherers, and any members of the public who sign or view the petitions after the voters have signed it.

The District Court's reliance on Supreme Court decisions protecting anonymous speech and the application of strict scrutiny is misplaced. Those cases, involve actions by government to compel a person to reveal information to the government or the public. The Public Records Act does not compel referendum petition signers to provide information to the government and the public, so strict scrutiny does not apply. Moreover, the State has a compelling interest for disclosing referendum petitions. Washington law permits anyone to challenge the Secretary of State's decision whether to certify an initiative or referendum measure to the ballot. Disclosure allows Washington citizens to independently examine whether the Secretary was correct. The State also has a compelling interest in giving citizens the opportunity to know who supports sending a measure to the ballot.

The District Court's erroneous conclusion that referendum petitions are anonymous speech caused the Court to mistakenly evaluate each of the standards that the Sponsors were required to demonstrate for a preliminary injunction.

The Sponsors also claim that the Public Records Act is unconstitutional as applied to Referendum 71 because the voters who signed the petition will be subjected to threats, harassment, and reprisals if the petitions are made public. To prevail on such a claim the Sponsors must establish a reasonable probability that disclosure will result in harm to the signers. The Sponsors do not meet this standard. The Court has protected organizations such as the NAACP, in Alabama in 1958, the Socialist Worker Party, and the Communist Party when government has sought to compel information from organizations about their private activities. Signing a referendum petition is not a private activity. A voter who signs a petition is engaged in a public legislative process.

The Sponsors' evidence also does not meet the standard. The courts have protected groups which were (1) small in number; (2) espoused views which were far outside the mainstream in their community and in their time; and (3) demonstrated a pervasive history of threats and harassment by private parties and government. In contrast, Referendum 71 petition signers (1) expect

to have a majority of votes to be successful in the Referendum 71 election; (2) support a traditional view of marriage; and (3) have no history of harassment by private parties or government. In other words, the signers of Referendum 71 are not at all like the NAACP, the Socialist Worker Party, or the Communist Party. And the evidence of threats and harassment presented by the Sponsors is minimal when compared to the threats and harassment against the NAACP, the Socialist Worker Party, or the Communist Party.

VI. ARGUMENT

A. The Standard For Granting A Preliminary Injunction

The District Court granted the Sponsors' motion for a preliminary injunction. A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365, 376, 172 L. Ed. 2d 249 (2008). In exercising their sound discretion, courts of equity should "pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id.* at 376-77 (citations omitted). A plaintiff seeking a preliminary injunction must establish "that he is likely to succeed on the merits [of his claim], that he is likely to suffer irreparable harm in the absence of preliminary relief, that the

balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 374 (citations omitted).

B. The Public Records Act Does Not Violate The Sponsors' Right To Anonymous Speech Under The First Amendment

The District Court entered its preliminary injunction based on Count I of the Sponsors' two-count Complaint. "In Count I of the Complaint, the Plaintiffs allege that the Washington Public Records Act, RCW 42.56.001, violates the First Amendment as applied to referendum petitions because the Act is not narrowly tailored to serve a compelling governmental interest." ER 002. As the District Court viewed it, the Sponsors' challenge to the Public Records Act concerns "an individual's right to participate in a political process and the government's authority to intrude on that right." ER 007. According to the District Court, "[t]he type of free speech in question is anonymous political speech." ER 009.

For reasons discussed below, the District Court erred in treating voters' signatures, names, and addresses on referendum petitions filed with the Secretary as anonymous political speech. As a result, the District Court erroneously analyzed Washington's Public Records Act under standards applicable to laws that compel disclosure of anonymous political speech. Because of this fundamental error, the District Court did not properly evaluate

any of the standards that a court must consider in determining whether to grant preliminary injunctive relief.

1. Signing Referendum Petitions Is Not Anonymous Speech

The Public Disclosure Act did not compel anyone to sign the Referendum 71 petitions. It was the Washington Constitution and statutes governing the referendum process that compelled Referendum 71 petition signers to disclose their names and addresses to the government and the public. Notably, the Sponsors do not challenge these laws.[2]

Article II, section 1(b) of the Washington Constitution provides that the people's reserved referendum power "may be ordered on any act, bill, or law, or any part thereof passed by the legislature . . . either by petition signed by the required percentage of the legal voters, or by the legislature." "The number of valid signatures of registered voters required on a petition for referendum . . . shall be equal to or exceeding four percent of the votes cast for office of governor at the last gubernatorial election." Wash. Const. art. II, § 1(b).

[2] Presumably, this is because the Sponsors successfully have invoked Washington's referendum process to send Referendum 71 to the ballot, and because, as discussed *infra* p. 24, the Sponsors realize that such a challenge would fail.

A Washington voter who petitions for a referendum election must sign the referendum petition, and print his or her name, address, town or city, and county of residence on the petition. Wash. Rev. Code § 29A.72.130, .150. Referendum petitioners "order and direct" the Secretary of State that the referendum "shall be referred to the people of the state for their approval or rejection." Wash Rev. Code § 29A.72.130. Referendum petitions also warn petitioners that knowingly providing false information on the petition may be punished by a fine, imprisonment, or both. Wash. Rev. Code § 29A.72.140; ER 066.

For a referendum to reach the ballot, the Secretary of State must determine that the petition contains the signatures of the requisite number of legal voters. Wash. Rev. Code § 29A.72.230. ("Upon filing of [a referendum] petition, the secretary of state shall proceed to verify and canvass the names of the legal voters on the petition.") "The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure." *Id.*

From these constitutional and statutory provisions, it is apparent that a voter cannot petition for a referendum election, and a referendum cannot qualify for the ballot, absent the petitioners disclosing their identities to the

government in petitioning for the election. It further is apparent that persons who sign referendum petitions are made fully aware that the petitions, which include the petitioners' signatures, printed names, and addresses, and direction to the Secretary of State, are disclosed to the government. Petitioners disclose this information to the Secretary of State, who acts on behalf of Washington's citizens, to determine whether there is sufficient support among Washington registered voters to send the measure to a vote. This information also is available to law enforcement officials, who similarly act on behalf of the people of Washington, to evaluate whether a petitioner engaged in criminal misconduct. Persons who sign petitions thus know that they have disclosed their identity to the government as part of seeking a referendum election.

In addition, in the course of the referendum signature-gathering process, referendum petitioners disclose their identities to an essentially unlimited segment of the public. Petition signers disclose their names and addresses to the sponsor of the measure who submits the petition to the Secretary of State. Wash. Rev. Code § 29A.72.150. ("[W]hen the person or organization demanding any referendum . . . has obtained [the requisite number] of signatures of legal voters . . . the petition containing the signatures may be submitted to the secretary of state.") Signers disclose their names and

addresses to signature gatherers. ER 25, 34-35. They also disclose this information to other members of the public. As the redacted Referendum 71 petition demonstrates, the first signer on the petition indiscriminately discloses his or her identity and support for a referendum election to as many as 19 other signers or anyone who simply reads the petition after it has been signed. ER 068-069.

Moreover, in Washington there is nothing to prevent a sponsor or signature gatherer from making a list of the names and addresses on the petitions before submitting the petitions to the Secretary of State. This list might be used for campaign and fund raising purposes. *See Bilofsky v. Deukmejian*, 124 Cal App. 3d 825, 828, 177 Cal. Rptr. 621, 623-24 (1981) (recognizing use of initiative petitioner information for such purposes, and rejecting First Amendment challenge by initiative proponent to statute prohibiting use of initiative petitions and signatures for purposes other than qualifying a measure for the ballot); *see also* Hosely, *Reforming Direct Democracy: Lessons From Oregon*, 93 Cal. L. Rev. 1191, 1233 (July, 2005)

(discussing the practice of sponsors using signatures to create a database of future supporters and potential reform to prohibit the practice).[3]

Under these circumstances, it is untenable to conclude, as did the District Court, that the Sponsors' challenge to Washington's Public Records Act concerns disclosure of anonymous political speech. The District Court cites no authority for the proposition that a person who discloses his identity to the government and to multiple private parties as part of engaging in political speech, nonetheless is engaged in anonymous political speech. Such a conclusion turns the meaning of anonymous on its head. "Anonymous" means: "Having an unknown or withheld authorship." *American Heritage Dictionary*, New College Edition 54 (1982). The identity of persons who sign referendum petitions is known; indeed, it must be known in order to trigger the referendum process.

To the extent this basic and seemingly self-evident principle requires case law support, such support is reflected in United States Supreme Court decisions concerning anonymous political speech. For example, in

[3] Because no discovery has been conducted in the case, we do not know if Referendum 71 sponsor Protect Marriage Washington has made use of the names and addresses on the Referendum 71 petitions in its campaign and fund raising.

Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 122 S. Ct. 2080, 153 L. Ed. 2d 205 (2002), the question before the Court was the validity under the First Amendment of a village ordinance "making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and receiving a permit." *Id*. at 153. The Court observed that "there are a significant number of persons who support causes anonymously" and who would be "deterred from speaking *because the registration provision would require them to forgo their right to speak anonymously*." *Id*. at 166; *id.* n.14 (emphasis added). The Court explained that "[t]he requirement that a canvasser must be identified in a permit application filed in the mayor's office and available for public inspection necessarily results in a surrender of that anonymity." *Id*. at 166.

Also recognizing that disclosure of a speaker's identity to the government forecloses the speaker's anonymity is *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 119 S. Ct. 636, 142 L. Ed. 2d 599 (1999). In that case, the Court held that a Colorado statute requiring circulators of initiative and referendum petitions to wear an identification badge violated the First Amendment. In so holding, the Court relied in part upon the fact that Colorado's interest in identifying and prosecuting petition circulators who

violated the law was adequately served by a state statute that required circulators to file an affidavit containing the circulator's name and address, and attesting to an understanding of and compliance with Colorado laws governing signature gathering. *Id*. at 196. The Court recognized that "the affidavit reveals the name of the circulator", a participant in political speech, "and is a public record." *Id*. at 198. Each of these cases thus supports the unremarkable proposition that anonymity does not survive a law requiring disclosure of the identity of the speaker to the government. *See also Peterson v. Nat'l Telecomm. & Info. Admin.*, 478 F.3d 626 (4th Cir. 2007) (rejecting the notion that a speaker who discloses his identity retains a right to anonymity).

For these reasons, the District Court erred in concluding that signing referendum petitions is anonymous speech.

2. Anonymous Speech Cases Have No Application To Speech That Is Not Anonymous

In evaluating Sponsors' First Amendment challenge to Washington's Public Records Act, the District Court relied on cases that consider First Amendment challenges to laws requiring disclosure of anonymous political speech to the government or the public. ER 009. Accordingly, the District Court held that the Public Records Act must satisfy First Amendment strict scrutiny. ER 013. "[T]he government may infringe on an individual's right to

free speech but only to the extent that such infringement is narrowly tailored to achieve a compelling governmental interest." ER 012. The District Court then determined that the Act failed to satisfy this erroneous standard because it is not narrowly tailored to the State's compelling interest in protecting the integrity of referendum elections. ER 015-016.

The District Court relied on (1) *Buckley*, a First Amendment challenge to a Colorado law requiring initiative petition circulators to wear identification badges; (2) *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995), a First Amendment challenge to an Ohio statute prohibiting distribution of anonymous campaign literature; (3) *Talley v. California*, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960), a First Amendment challenge to a municipal ordinance prohibiting the distribution of handbills not containing the name and address of the preparer; and (4) *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), a Fist Amendment challenge to a request for a court order requiring identification of anonymous internet users.

None of these cases is apposite. Unlike the provisions in each of those cases, Washington's Public Records Act, does not require anyone to disclose anonymous speech to the government or the public. Rather, with certain

exceptions not relevant to this case, the Public Records Act merely requires government to make available for public inspection, upon request, records in its possession that relate to the conduct of government. Wash. Rev. Code §§ 42.56.010(2), .070. This includes signed referendum petitions that, for reasons previously explained, do not constitute anonymous speech.

It may be that the constitutional standards applied to anonymous political speech in the cases relied upon by the District Court would apply to Washington's election laws requiring referendum petitioners to disclose their names and addresses on referendum petitions. But the Sponsors do not challenge those laws, and it seems apparent that they would withstand strict scrutiny.

Washington has a compelling interest in determining whether there is sufficient support for a referendum measure to qualify it to the ballot. In Washington, a referendum election initiated by voter petition may be held only if a constitutionally established percentage of lawful voters petition for a referendum election. Wash. Const., art. II, §1(b); Wash. Rev. Code § 29A.72.150. In order for the Secretary of State to verify whether a referendum petition is supported by the requisite number of lawful voters, referendum petitioners must disclose their identities so that the Secretary can

compare the signature on the petition with the signature on the signer's voter registration. Wash. Rev. Code §§ 29A.72.130, .150, .230.

The District Court agreed that the State must employ some measure to prevent fraud in the referendum process. ER 013. But the Court concluded that the Public Disclosure Act was not narrowly tailored because disclosure of the petitions to the public would not help prevent fraud. ER 015. The District Court is in error. The State has a compelling interest in protecting the authority of its citizens to oversee government decision-making with respect to qualification of referendums to the ballot. Wash. Rev. Code § 29A.72.240 provides that "*[a]ny citizen dissatisfied with the determination of the secretary of state* that [a referendum] contains or does not contain the requisite number of signatures of legal voters" *may appeal to the superior court* and seek a writ of mandate to compel certification or an injunction to prevent certification of the measure to the ballot. (Emphasis added.)

Public access to signed petitions allows Washington citizens independently to examine whether the Secretary properly certified or properly declined to certify a referendum measure for the ballot, and to discover and report possible criminal law violations by petition signers. Without access to the names and addresses of signers, members of the public would be unable even to verify

the gross number of signatures submitted, whether the State accepted duplicate signatures, or whether the State accepted signatures from persons disqualified from voting. "A state indisputably has a compelling interest in preserving the integrity of its election process." *Eu. v. San Francisco Cy. Democratic Central Comm.*, 489 U.S. 214, 231, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989), citing *Rosario v. Rockefeller*, 410 U.S. 752, 761, 93 S. Ct. 1245, 36 L. Ed. 2d 1 (1973).

The State also has a compelling interest in affording its citizens the opportunity to know who supports sending referendum measures to the ballot. *See California Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1105-07 (9th Cir. 2003) ("Voters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure's defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation. We think Californians, as lawmakers, have an interest in knowing who is lobbying for their vote[.]"). While such information may not be determinative to a voter, it certainly is a factor that the electorate is entitled to take into account in deciding how to vote.

The District Court discounted this interest because petition signers may simply want to have an election on the measure, and have not yet made up their

minds how they will vote. ER 015. Some voters may sign a petition who do not support the measure. However, it is more likely that a person who signs a petition supports the measure, and even where that is not the case, a signer's request for a plebiscite on a bill enacted by the legislature is matter of potential interest to other voters.

More importantly, if voters know that their neighbors signed a petition, the voters are in a position to ask the neighbors why. In an emotionally charged issue like Referendum 71 this can lead to confrontation instead of conversation. However, most measures are not so emotionally charged. The last five measures in which petitions have been disclosed involve less emotionally charged topics like limiting motor vehicle charges; government regulation of private property; energy resource use by public utilities; long-term care services; and government revenue. ER 080.

In sum, the anonymous speech cases have no application to this case—and the Public Disclosure Act is not subject to strict scrutiny—because the Act does not compel petition signers to reveal their names and address to the government and the public. But even if the Act was subject to strict scrutiny, the State has a compelling interest in disclosure.

C. The Sponsors Are Not Entitled To A Preliminary Injunction On Their Anonymous Speech Claim

The District Court erred in granting the Sponsors' motion for a preliminary injunction on their anonymous speech claim The Court misapplied each of the factors for granting a preliminary injunction. First, the Court erred in its ruling that the Sponsors were likely to prevail on the merits. The Public Disclosure Act did not compel petition signers to disclose their names and addresses to the government and the public. The law governing the referendum process—that the Sponsors do not challenge—compelled the disclosure. The anonymous speech cases have no application in this case, and the Act is not subject to strict scrutiny. Moreover, the State's compelling interest in disclosure represents a governmental interest that weighs against the Sponsors' interest in preventing release of the petitions. *See supra* p. 24.

Based on its erroneous conclusion that the Sponsors demonstrated a likelihood of success on the merits, the District Court *presumed* irreparable harm in the absence of preliminary injunctive relief. The District Court explained that, "[b]ecause this court finds that referendum petitions are likely to be protected under the First Amendment, Plaintiffs are entitled to the presumption that they will be irreparably harmed absent preliminary relief." ER 016. Sponsors were not entitled to this presumption of harm and, except

for presumed harm, Sponsors did not assert harm based on this count of their Complaint.

The District Court's erroneous presumption of irreparable harm, in turn, led the District Court to conclude that it was compelled to find that the equities tipped in the Sponsors' favor. In this respect, the District Court stated, "[b]ecause this Court finds that the Plaintiffs have established that this case likely raises serious First Amendment questions in regard to protected speech and this court thereby presumes irreparable injury, under *Summartano* [sic], this court also finds that the equities tip in favor of the Plaintiffs." ER 017. For the same reasons explained above, this conclusion was in error. Based on it, the District Court did not consider that entry of a preliminary injunction would deprive Washington's citizens of access to government information to which they are entitled with respect to referendums, including Referendum 71.

Finally, the same fundamental error also caused the District Court to give short shrift to the public interest. The District Court's consideration of the public interest was limited to its conclusion that "'it is always in the public interest to prevent the violation of a party's constitutional rights.' [*Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002)]." ER 017. The District Court's reliance on *Sammartano* is misplaced. The *Sammartano* Court

explained that the "public interest inquiry primarily *addresses impact on non-parties rather than parties*." *Sammartano*, 303 F.3d at 974 (emphasis added). And the Court found that the "potential for impact on nonparties is plainly present here." *Id*. The District Court's public interest focus is exclusively on the party Sponsors.

In fact, granting injunctive relief would frustrate important public policies. The people of the State, acting both through the legislature and through direct legislation, have set a strong policy in favor of public disclosure of public records, and have not provided any exception for referendum signature petitions. The Public Records Act, Wash. Rev. Code § 42.56.070, was originally enacted by the people in an initiative measure (Initiative Measure No. 276, 1973 Wash. Sess. Laws page nos. 1-31). It includes this unequivocal statement of the public interest:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

Wash. Rev. Code § 42.56.030.

As the people of Washington have determined, public access to records relating to the conduct of government, including referendum petitions, is critical if Washington's citizens are to be informed "so that they may maintain control over the instruments that they have created." *Id*. The Sponsors wish to shield from the public, information that they have provided to government and private parties necessary to invoke a public legislative process. The equities do not favor injunctive relief and an injunction would be contrary to the public interest.

In summary, the District Court made fundamental errors of law in granting Plaintiffs' motion for a preliminary injunction, and thus abused its discretion. The Order Granting Plaintiffs' Motion for Preliminary Injunction should be reversed.

D. The Sponsors' Alternative First Amendment, As Applied Claim, Is Plainly Unsound And Cannot Support Preliminary Injunctive Relief

The District Court found it unnecessary to reach Sponsors' second claim for relief (ER 016) that providing the Referendum 71 petitions under the Public Records Act would violate the petition signers' First Amendment right of association because disclosure would subject them to threats, reprisals, and harassment. The courts have, in limited circumstances, struck down laws that require groups to disclose information to the government or to the public. *Nat'l*

Ass'n for the Advancement of Colored People (NAACP) v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63, 78 S. Ct. 1163, 2 L. Ed. 1488 (1958); *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 103 S. Ct. 416, 74 L. Ed. 2d. 250 (1982); and *Fed. Election Comm'n v. Hall-Tyner Election Campaign Comm.*, 678 F.2d 416 (2nd Cir. 1982). However, the Sponsors do not satisfy the criteria for a preliminary injunction on this claim. The consideration of the governmental interest, the equities, and the public interest all favor denying the injunction for the same reasons as for the Sponsors' first claim. *Supra* pp. 24, 29. Moreover, the Sponsors are not likely to succeed on the merits of the claim. To succeed on their claim, the Sponsors must establish "a 'reasonable probability' that the compelled disclosures will subject those identified to 'threats, harassment, or reprisals.'" *Brown*, 459 U.S. at 88 (quoting *Buckley v. Valeo*, 424 U.S. 1, 74, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976). The Sponsors fail to meet this burden and for the same reasoning fail to demonstrate irreparable harm required for a preliminary injunction.

1. Sponsors Are Engaged In A Public Process, Not Private Associational Activity

At the outset, the Court's decision protecting First Amendment rights of association involve laws governing a group's private activities. *NAACP*, *Brown*, and *Hall-Tyner* all concern private organizations engaged in private

organizational activities. The organizations opposed government reporting requirements with respect to their private activities. In contrast, a citizen who signs a referendum petition is engaged in a public legislative process. "A referendum or an initiative measure is an exercise of the reserved power of the people to legislate[.]" *State ex rel. Heavey v. Murphy*, 138 Wash. 2d 800, 808, 982 P.2d 611 (1999). As a petition signer, a citizen acts in a governmental capacity, joining with others to propose legislation for consideration by the electorate.

The signer's act is inherently public. As is more fully discussed above (*Supra* p. 16), the Sponsors have identified themselves to the government and the public in order to invoke a governmental public process. Having done so, they now complain that the public should not be allowed access to the petitions that triggered the process. There is no basis for extending the narrow First Amendment exemption developed in the case law, protecting the disclosure of the names of the members of organizations engaged in private activity, to the context of the public activity of signing a referendum petition to invoke a public legislative process.

2. The Sponsors Cannot Establish A Reasonable Probability That Release of Referendum 71 Petitions Will Lead To Threats, Reprisals, and Harassment

To establish a reasonable probability that the release of Referendum 71 petitions will result in harm to the Sponsors, they filed with their motion copies of 58 John Doe declarations (John Doe No. 1 through John Doe No. 58) that were originally filed in *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D.Cal. 2009). ER 131-465. This case involved a First Amendment challenge to California's law requiring disclosure of campaign contributions in connection with the election on Proposition 8, which amended the California Constitution to prohibit same-sex marriage. When Sponsors filed their reply brief in the District Court, they submitted three additional John Doe declarations (John Doe No. 3 through John Doe No. 5) from individuals who signed Referendum 71, two of whom were active in gathering signatures. ER 024-043.

Sponsors' evidence does not meet the reasonable probability standard for two reasons. First, the courts have extended this exception only to established groups who could demonstrate that they were unpopular and disadvantaged in comparison to their adversaries, and who thus could demonstrate a reasonable probability that disclosure of the names of their members would result in threats,

harassment, and reprisals that would seriously undermine their ability to associate for First Amendment purposes. The seminal case of this nature is *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 462-63, in which the state of Alabama sought to compel disclosure of membership information from the NAACP. The Court held that the NAACP had "made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. Of course, the context of the case is that the NAACP was challenging the official state policy of segregation in Alabama in the 1950's.

Brown dealt with the disclosure of names of the members of the Ohio Socialist Workers Party (SWP). The SWP was "a small political party with approximately sixty members" whose goal was "the abolition of capitalism and the establishment of a workers' government to achieve socialism." *Id.*, 459 U.S. at 88. The evidence in *Brown* established that, in the four years preceding the trial, there were "threatening phone calls and hate mail, the burning of SWP literature, the destruction of SWP members' property, police harassment of a party candidate, and the firing of shots at an SWP office." *Id*. at 99. "There was

also evidence that in the 12-month period before trial 22 SWP members, including four in Ohio, were fired because of their party membership." *Id.* The evidence also established that the Federal Bureau of Investigation "had conducted surveillance of the Ohio SWP and had interfered with its activities within the State" *Id.* at 100.

Similarly, in *Hall-Tyner*, the Court held that the Communist Party was exempt from disclosure under the Federal Election Campaign Act. For evidence of threats and harassment, the Court pointed to the fact that "[n]umerous statutes purport to subject members of the Communist Party to both civil disabilities and criminal liability." *Hall-Tyner*, 678 F.2d at 422. The Court also pointed to the fact that states have enacted "laws which place supporters of the Committee in danger of legal sanctions or harassment if their ties with the Communist Party should be made public. It is still illegal in many states simply to be a member of the Communist Party." *Id.* Finally, the Court pointed to a Senate report that detailed "extensive governmental surveillance and harassment long directed at the Communist Party and its members." *Id.* at 423.

These cases all involve threats against groups which were (1) small in number; (2) espoused views which were far outside the mainstream in their

community and in their time; and (3) demonstrated a pervasive history of threats and harassment by private parties and government. By contrast, the petition signers in this case are not part of a particular small or even identifiable group. They are not known to have anything in common except that they individually signed petitions to place Referendum Measure 71 on the ballot. There is no evidence that they constitute a small minority which has been marginalized or historically disadvantaged relative to their opponents, or that by virtue of such a status, the purpose for which they have "associated"—to submit requisite signatures to place Referendum 71 on the ballot—has been thwarted. On the contrary, they obviously hope that opponents of E2SSB 5688 will be in the majority in the November election, and present no evidence that their campaign is a futile gesture by a disfavored minority group.

The second reason that Sponsors cannot demonstrate a reasonable probability of serious harassment, threats, or reprisals is that their evidence is insubstantial. Sponsors filed 61 declarations to establish a reasonable probability that the signers of Referendum 71 would be harmed by public access to their names.

None of the declarations submitted by the Sponsors recounts any examples of physical injury to any persons. And, the only activities that 20 of the 58

California declarations reported were stolen yard signs or ripped off bumper stickers. ER 273, 349, 357-385, 400-418, 425, 454, 461.

Only six declarations report property damage. This includes a broken window in a California church which had a "Yes on Proposition 8" sign in its yard (ER 147-157); a smashed window in a car with a bumper sticker (ER 218-219); the "keying" of two cars with bumper stickers (ER 221-222, 224-225); vandalizing houses and cars with eggs, flour, and honey (ER 228-229); and painting a statue outside a church on the night Proposition 8 passed (ER 269-270). None of the three Washington John Does described any property damage.

The declarations also report various types of harassing mail, email, telephone calls, or other communication. For example, one John Doe stated that three groups had been formed on the internet to boycott the signer's business (ER 132-133); that a lesbian couple stopped doing business with him after seeing a sign in his yard (ER 257-258); that members of his country club were no longer friendly, and made rude comments (ER 264).

Some of the email and letters involved name calling and obscenity. There was an email stating: "Congratulations. for your support of prop 8, you have won our tampon of the year award. Please contact us is [sic] you would like to pick up your prize." ER 159. Another received a voice mail stating: "I certainly

hope that someday somebody takes away something from you and then you'll realize what a fucking bitch you are." ER 207. Someone yelled "shame" at one of the John Does when he was holding a Yes on 8 sign, and another person yelled "You despicable filthy bag of shit." ER 243. A number of John Does received multiple calls or emails or letters. ER 197, 293.

The declarations also report communication that expressed disappointment. For example, a John Doe reported receiving a postcard from a gay couple who had married. It explained something about their life and then said:

> We just hope you are proud of your participation in this Great Crusade. Just think of how you have contributed to the economy with the money you donated! It doesn't matter that there are thousands of worthwhile charities that could have used those funds to feed starving people, clothe the homeless, and find cures for cancer and other life-threatening diseases. You must be so proud!

ER 188.

Some of the activity reported appears to be legitimate debate about the issues. One John Doe reported that when he held a fundraising event for Proposition 8, "a group of protesters demonstrated at the entrance to my community. They attempted to pass out flyers [criticizing my support for Proposition 8] to the guests of the fundraiser as they passed through the gate to my community." ER 159. Washington John Doe No. 4 reported that when he

was gathering signatures, a transgender person asked why he supported Referendum 71. John Doe No. 4 stated:

> I told him/her it was because of my Christian beliefs. He/she started getting argumentative and asked, "What does the Bible say about that?" I quoted the verse of the Bible to him/her. At this point he/she got more argumentative, so I told him/her, "It's obvious you're not interested in what the Bible says, so we should discontinue this conversation."

ER 034. According to John Doe No. 4, the "transgender person then said, 'I'm going to come get *a whole bunch* of my gay and transgender friends and we're going to be there next Sunday *at your church*.' It was clear this was meant to be a threat." ER 034-035. John Doe No. 4 does not state whether the transgender person attended his church the following Sunday.

Washington John Doe Nos. 4 and 5 received a number of harassing phone calls and voice mail messages. They "called the police. . . . The officer who responded listened to the messages that David had left on our answering machine. The officer then called David and told him not to continue the harassment and threats and that he was not welcome at our church." ER 027. The harassing phone calls stopped, and the man did not show up at the church. ER 027.

The Sponsors' Verified Complaint also discusses threatening phone calls and emails received by Larry Stickney, the campaign manager for Referendum 7,

such as "You better stay off the olympic peninsula . . . it's a very dangerous place filled with people who hate racists, gay bashers and anyone who doesn't believe in equality. Fair is fair." ER 470. A blog stated: "If Larry Stickney can do 'legal' things that harm OUR family, why can't we go to Arlington, WA to harm his family?" ER 470.[4]

Much of the conduct described in Sponsors' declarations was unfortunate, and some probably constituted a violation of criminal laws. However, it does not establish a reasonable probability that the signers of Referendum 71 will suffer harm if their names are released to the public. The threats and harassment described is simply not comparable to that faced by the NAACP in Alabama in 1958, when segregation was state law. Nor does it compare to the private and government harassment of the Socialist Workers Party or the Communist Party.

In *ProtectMarriage.com*, the Court rejected the Plaintiffs' claim based on the declarations submitted in this case. The Court found that "[p]laintiffs'

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[4] The Court should also be cautious in extrapolating the experiences of Mr. Stickney, the campaign manager for Protect Marriage Washington, to everyone who signs a referendum petition. Verified Compl., Ex. 1, 2, and 3. Without minimizing the disturbing and distasteful nature of some of the emails and phone calls Mr. Stickney reports receiving, a spokesperson for a controversial issue will receive more than an ordinary share of attention, some of it negative. It does not follow that anyone known to have signed a Referendum 71 petition is likely to suffer harm as a result.

claim would have little chance of success in light of the relatively minimal occurrences of threats, harassment, and reprisals." *ProtectMarriage.com*, 599 F. Supp. 2d at 1216. The Court explained that in "prior cases . . . plaintiffs alleged to have suffered mistreatment over extended periods of time[.]" *Id*. at 1217. The Court found that "the alleged harassment directed at Proposition 8 supporters occurred over the course of a few months during the heat of an election battle surrounding a hotly contested ballot initiative. Only random acts of violence directed at a very small segment of the supporters of the initiative are alleged." *Id*. The Court held that the plaintiffs "cannot, allege that the movement to recognize marriage in California as existing only between a man and a woman is vulnerable to the same threats as were socialist and communist groups, or, for that matter, the NAACP." *Id*. Thus, "Proposition 8 supporters promoted a concept entirely devoid of governmental hostility. Plaintiffs' belief in the traditional concept of marriage . . . ha[s] not historically invited animosity. The Court is at a loss to find any principled analogy between two such greatly diverging sets of circumstances." *Id*.

According to the Court, there "is surely no evidence that the seven million individuals who voted in favor of Proposition 8 can be considered a 'fringe organization' or that their beliefs would be considered unpopular or

unorthodox." *Id*. at 1215. Similarly, in this case, the sponsors of Referendum 71 submitted about 122,000 valid signatures in 68 days. This is not evidence of a minority group with unorthodox beliefs. Simply put, the Sponsors in this case are not in the same position as the NAACP, the Socialist Workers Party, or the Communist Party.

Moreover, some of the conduct described falls into the category of legitimate public debate. On issues of public importance, citizens sometimes disagree. Engaging in a protest at a fundraiser, refusing to do business with persons whose position on a political issue one finds unacceptable, or snubbing fellow citizens on the street or at the country club are examples of ordinary social interaction. Though these incidents may make people sad or uncomfortable, they are not legitimate examples of "harassment," let alone irreparable harm. Anyone who takes a public stand on an issue knows that others may disagree and may express disagreement in many different ways. The Court in *ProtectMarriage.com* observed that plaintiffs' "argument appears to be premised . . . on the concept that individuals should be free from even legal consequences of their speech. That is simply not the nature of their right. Just as contributors to Proposition 8 are free to speak in favor of the initiative, so

are opponents free to express their disagreement through proper legal means." *Id.* at 1217. The same is true in this case.

The Sponsors have not established a reasonable probability that the signers of Referendum 71 will be subject to harm, if their names are provided to the public. For this reason, they are not likely to prevail on the merits of their as-applied claim. For the same reason, the Sponsors cannot establish irreparable harm required for a preliminary injunction. Thus, the Sponsors are not entitled to a preliminary injunction on their as-applied claim.

VII. CONCLUSION

For the reasons stated herein, the preliminary injunction granted in this case should be reversed.

RESPECTFULLY SUBMITTED this 18th day of September, 2009.

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STATEMENT OF RELATED CASES

John Doe #1, et al. v. Washington Coalition for Open Government
9th Cir. No. 09-35826

This case is related to *John Doe #1, et al. v. Sam Reed*, 9th Cir. #09-35818 because it appeals the Order Granting Plaintiffs' Motion for Preliminary Injunction in USDC, Western District of Washington, Tacoma, #C09-5456BHS, dated September 10, 2009.

John Doe #1, et al. v. Arthur West
9th Cir. #09-35832

This appeal was filed in connection with *John Doe #1, et al. v. Sam Reed*, 9th Cir. #09-35818.

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed.R.App.P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 9,433 words.

September 18, 2009	/s/ William B. Collins
Date	William B. Collins WSBA #785

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2009, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ William B. Collins
William B. Collins

ADDENDUM

Addendum

WASHINGTON CONSTITUTION

ARTICLE II
LEGISLATIVE DEPARTMENT

SECTION 1 LEGISLATIVE POWERS, WHERE VESTED. The legislative authority of the state of Washington shall be vested in the legislature, consisting of a senate and house of representatives, which shall be called the legislature of the state of Washington, but the people reserve to themselves the power to propose bills, laws, and to enact or reject the same at the polls, independent of the legislature, and also reserve power, at their own option, to approve or reject at the polls any act, item, section, or part of any bill, act, or law passed by the legislature.

(a) Initiative: The first power reserved by the people is the initiative. Every such petition shall include the full text of the measure so proposed. In the case of initiatives to the legislature and initiatives to the people, the number of valid signatures of legal voters required shall be equal to eight percent of the votes cast for the office of governor at the last gubernatorial election preceding the initial filing of the text of the initiative measure with the secretary of state.

Initiative petitions shall be filed with the secretary of state not less than four months before the election at which they are to be voted upon, or not less than ten days before any regular session of the legislature. If filed at least four months before the election at which they are to be voted upon, he shall submit the same to the vote of the people at the said election. If such petitions are filed not less than ten days before any regular session of the legislature, he shall certify the results within forty days of the filing. If certification is not complete by the date that the legislature convenes, he shall provisionally certify the measure pending final certification of the measure. Such initiative measures, whether certified or provisionally certified, shall take precedence over all other measures in the legislature except appropriation bills and shall be either enacted or rejected without change or amendment by the legislature before the end of such regular session. If any such initiative measures shall be enacted by the legislature it shall be subject to the referendum petition, or it may be enacted and referred by the legislature to the people for approval or rejection at the next regular election. If it is rejected or if no action is taken upon it by the legislature before the end of such regular session, the secretary of state shall submit it to the people for approval or rejection at the next ensuing regular general election. The legislature may reject any measure so proposed by initiative petition and propose a different one dealing with the same subject, and in such event both measures shall be submitted by the secretary of state to the people for approval or rejection at the next ensuing regular general election. When conflicting measures are submitted to the people the ballots shall be so printed that a voter can express separately by making one cross (X) for each, two preferences, first, as between either measure and neither, and secondly, as between one and the other. If the majority of those voting on the first issue is for neither, both fail, but in that case the votes on the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law.

(b) Referendum. The second power reserved by the people is the referendum, and it may be ordered on any act, bill, law, or any part thereof passed by the legislature, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions, either by petition signed by the required percentage of the legal voters, or by the legislature as other bills are enacted: *Provided,* That the legislature may not order a referendum on any initiative measure enacted by the legislature under the foregoing subsection (a). The number of valid signatures of registered voters required on a petition for referendum of an act of the legislature or any part thereof, shall be equal to or exceeding four percent of the votes cast for the office of governor at the last gubernatorial election preceding the filing of the text of the referendum measure with the secretary of state.

(c) No act, law, or bill subject to referendum shall take effect until ninety days after the adjournment of the session at which it was enacted. No act, law, or bill approved by a majority of the electors voting thereon shall be amended or repealed by the legislature within a period of two years following such enactment: *Provided,* That any such act, law, or bill may be amended within two years after such enactment at any regular or special session of the legislature by a vote of two-thirds of all the members elected to each house with full compliance with section 12, Article III, of the Washington Constitution, and no amendatory law adopted in accordance with this provision shall be subject to referendum. But such enactment may be amended or repealed at any general regular or special election by direct vote of the people thereon.

(d) The filing of a referendum petition against one or more items, sections, or parts of any act, law, or bill shall not delay the remainder of the measure from becoming operative. Referendum petitions against measures passed by the legislature shall be filed with the secretary of state not later than ninety days after the final adjournment of the session of the legislature which passed the measure on which the referendum is demanded. The veto power of the governor shall not extend to measures initiated by or referred to the people. All elections on measures referred to the people of the state shall be had at the next succeeding regular general election following the filing of the measure with the secretary of state, except when the legislature shall order a special election. Any measure initiated by the people or referred to the people as herein provided shall take effect and become the law if it is approved by a majority of the votes cast thereon: *Provided,* That the vote cast upon such question or measure shall equal one-third of the total votes cast at such election and not otherwise. Such measure shall be in operation on and after the thirtieth day after the election at which it is approved. The style of all bills proposed by initiative petition shall be: "Be it enacted by the people of the State of Washington." This section shall not be construed to deprive any member of the legislature of the right to introduce any measure. All such petitions shall be filed with the secretary of state, who shall be guided by the general laws in submitting the same to the people until additional legislation shall especially provide therefor. This section is self-executing, but legislation may be enacted especially to facilitate its operation.

(e) The legislature shall provide methods of publicity of all laws or parts of laws, and amendments to the Constitution referred to the people with arguments for and against the laws and amendments so referred. The secretary of state shall send one copy of the publication to each individual place of residence in the state and shall make such additional distribution as he shall determine necessary to reasonably assure that each voter will have an opportunity to study the measures prior to election. [**AMENDMENT 72,** 1981 Substitute Senate Joint Resolution No. 133, p 1796. Approved November 3, 1981.]

RCW 29A.72.130
Referendum petitions — Form.

Petitions ordering that acts or parts of acts passed by the legislature be referred to the people at the next ensuing general election, or special election ordered by the legislature, must be substantially in the following form:

The warning prescribed by RCW 29A.72.140; followed by:

PETITION FOR REFERENDUM

To the Honorable . . . . . ., Secretary of State of the State of Washington:

We, the undersigned citizens and legal voters of the State of Washington, respectfully order and direct that Referendum Measure No. . . . . ., filed to revoke a (or part or parts of a) bill that (concise statement required by RCW 29A.36.071) and that was passed by the . . . . . legislature of the State of Washington at the last regular (special) session of said legislature, shall be referred to the people of the state for their approval or rejection at the regular (special) election to be held on the . . . . day of November, (year); and each of us for himself or herself says: I have personally signed this petition; I am a legal voter of the State of Washington, in the city (or town) and county written after my name, my residence address is correctly stated, and I have knowingly signed this petition only once.

The following declaration must be printed on the reverse side of the petition:

I, ..., swear or affirm under penalty of law that I circulated this sheet of the foregoing petition, and that, to the best of my knowledge, every person who signed this sheet of the foregoing petition knowingly and without any compensation or promise of compensation willingly signed his or her true name and that the information provided therewith is true and correct. I further acknowledge that under chapter 29A.84 RCW, forgery of signatures on this petition constitutes a class C felony, and that offering any consideration or gratuity to any person to induce them to sign a petition is a gross misdemeanor, such violations being punishable by fine or imprisonment or both.

RCW 9A.46.020 applies to any conduct constituting harassment against a petition signature gatherer. This penalty does not preclude the victim from seeking any other remedy otherwise available under law.

The petition must include a place for each petitioner to sign and print his or her name, and the address, city, and county at which he or she is registered to vote.

[2005 c 239 § 3; 2003 c 111 § 1814; 1993 c 256 § 10; 1982 c 116 § 11; 1965 c 9 §29.79.110 . Prior: 1913 c 138 § 7, part; RRS § 5403, part. Formerly RCW 29.79.110.]

Notes:

Effective date -- 2005 c 239: See note following RCW 29A.72.110.

Severability -- Effective date -- 1993 c 256: See notes following RCW 29A.84.280.

RCW 29A.72.140

Warning statement — Further requirements.

The word "warning" and the following warning statement regarding signing petitions must appear on petitions as prescribed by this title and must be printed on each petition sheet such that they occupy not less than four square inches of the front of the petition sheet.

WARNING

Every person who signs this petition with any other than his or her true name, knowingly signs more than one of these petitions, signs this petition when he or she is not a legal voter, or makes any false statement on this petition may be punished by fine or imprisonment or both.

[2003 c 111 § 1815; 1993 c 256 § 5. Formerly RCW 29.79.115.]

Notes:

Severability -- Effective date -- 1993 c 256: See notes following RCW 29A.84.280.

RCW 29A.72.150
Petitions — Signatures — Number necessary.

When the person proposing any initiative measure has obtained signatures of legal voters equal to or exceeding eight percent of the votes cast for the office of governor at the last regular gubernatorial election prior to the submission of the signatures for verification, or when the person or organization demanding any referendum of an act or part of an act of the legislature has obtained a number of signatures of legal voters equal to or exceeding four percent of the votes cast for the office of governor at the last regular gubernatorial election prior to the submission of the signatures for verification, the petition containing the signatures may be submitted to the secretary of state for filing.

[2003 c 111 § 1816; 1982 c 116 § 12; 1965 c 9 § 29.79.120. Prior: 1913 c 138 § 11, part; RRS § 5407, part. See also State Constitution Art. 2 § 1A (Amendment 30), (L. 1955, p. 1860, S.J.R. No. 4). Formerly RCW 29.79.120.]

RCWs > Title 29A > Chapter 29A.72 > Section 29A.72.160

29A.72.150 << 29A.72.160 >> 29A.72.170

RCW 29A.72.160
Petitions — Time for filing.

The time for submitting initiative or referendum petitions to the secretary of state for filing is as follows:

(1) A referendum petition ordering and directing that the whole or some part or parts of an act passed by the legislature be referred to the people for their approval or rejection at the next ensuing general election or a special election ordered by the legislature, must be submitted not more than ninety days after the final adjournment of the session of the legislature which passed the act;

(2) An initiative petition proposing a measure to be submitted to the people for their approval or rejection at the next ensuing general election, must be submitted not less than four months before the date of such election;

(3) An initiative petition proposing a measure to be submitted to the legislature at its next ensuing regular session must be submitted not less than ten days before the commencement of the session.

[2003 c 111 § 1817. Prior: 1965 c 9 §29.79.140 ; prior: 1913 c 138 § 12, part; RRS § 5408, part. Formerly RCW 29.79.140.]

Notes:

Initiative, referendum, time for filing: State Constitution Art. 2 § 1 (a) and (d) (Amendment 7).

Measures, petitions, time for filing various types: RCW 29A.72.030.

RCW 29A.72.170

Petitions — Acceptance or rejection by secretary of state.

The secretary of state may refuse to file any initiative or referendum petition being submitted upon any of the following grounds:

(1) That the petition does not contain the information required by RCW 29A.72.110, 29A.72.120, or 29A.72.130.

(2) That the petition clearly bears insufficient signatures.

(3) That the time within which the petition may be filed has expired.

In case of such refusal, the secretary of state shall endorse on the petition the word "submitted" and the date, and retain the petition pending appeal.

If none of the grounds for refusal exists, the secretary of state must accept and file the petition.

[2003 c 111 § 1818; 1982 c 116 § 13; 1965 c 9 § 29.79.150. Prior: (i) 1913 c 138 § 11, part; RRS § 5407, part. (ii) 1913 c 138 § 12, part; RRS § 5408, part. Formerly RCW 29.79.150.]

RCW 29A.72.210

Petitions — Consolidation into volumes.

If the secretary of state accepts and files an initiative or referendum petition upon its being submitted for filing or if he or she is required to file it by the court, he or she shall, in the presence of the person submitting such petition for filing if he or she desires to be present, arrange and assemble the sheets containing the signatures into such volumes as will be most convenient for verification and canvassing and shall consecutively number the volumes and stamp the date of filing on each volume.

[2003 c 111 § 1822. Prior: 1982 c 116 § 14; 1965 c 9 § 29.79.190; prior: 1913 c 138 § 14; RRS § 5410. Formerly RCW 29.79.190.]

RCW 29A.72.230

Petitions — Verification and canvass of signatures, observers — Statistical sampling — Initiatives to legislature, certification of.

Upon the filing of an initiative or referendum petition, the secretary of state shall proceed to verify and canvass the names of the legal voters on the petition. The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county. The secretary of state may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides. The secretary of state may use any statistical sampling techniques for this verification and canvass which have been adopted by rule as provided by chapter 34.05 RCW. No petition will be rejected on the basis of any statistical method employed, and no petition will be accepted on the basis of any statistical method employed if such method indicates that the petition contains fewer than the requisite number of signatures of legal voters. If the secretary of state finds the same name signed to more than one petition, he or she shall reject all but the first such valid signature. For an initiative to the legislature, the secretary of state shall transmit a certified copy of the proposed measure to the legislature at the opening of its session and, as soon as the signatures on the petition have been verified and canvassed, the secretary of state shall send to the legislature a certificate of the facts relating to the filing, verification, and canvass of the petition.

[2003 c 111 § 1823. Prior: 1993 c 368 § 1; 1982 c 116 § 15; 1977 ex.s. c 361 § 105; 1969 ex.s. c 107 § 1; 1965 c 9 § 29.79.200; prior: 1933 c 144 § 1; 1913 c 138 § 15; RRS § 5411. Formerly RCW 29.79.200.]

Notes:

Effective date — 1993 c 368: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 368 § 2.]

Effective date -- Severability — 1977 ex.s. c 361: See notes following RCW 29A.16.040.

RCWs > Title 42 > Chapter 42.56 > Section 42.56.010

42.56.001 << 42.56.010 >> 42.56.020

RCW 42.56.010

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Agency" includes all state agencies and all local agencies. "State agency" includes every state office, department, division, bureau, board, commission, or other state agency. "Local agency" includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division, bureau, board, commission, or agency thereof, or other local public agency.

(2) "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. For the office of the secretary of the senate and the office of the chief clerk of the house of representatives, public records means legislative records as defined in RCW 40.14.100 and also means the following: All budget and financial records; personnel leave, travel, and payroll records; records of legislative sessions; reports submitted to the legislature; and any other record designated a public record by any official action of the senate or the house of representatives.

(3) "Writing" means handwriting, typewriting, printing, photostating, photographing, and every other means of recording any form of communication or representation including, but not limited to, letters, words, pictures, sounds, or symbols, or combination thereof, and all papers, maps, magnetic or paper tapes, photographic films and prints, motion picture, film and video recordings, magnetic or punched cards, discs, drums, diskettes, sound recordings, and other documents including existing data compilations from which information may be obtained or translated.

[2007 c 197 § 1; 2005 c 274 § 101.]

RCW 42.56.030

Construction.

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected. In the event of conflict between the provisions of this chapter and any other act, the provisions of this chapter shall govern.

[2007 c 197 § 2; 2005 c 274 § 283; 1992 c 139 § 2. Formerly RCW 42.17.251.]

RCW 42.56.070

Documents and indexes to be made public.

(1) Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of *subsection (6) of this section, this chapter, or other statute which exempts or prohibits disclosure of specific information or records. To the extent required to prevent an unreasonable invasion of personal privacy interests protected by this chapter, an agency shall delete identifying details in a manner consistent with this chapter when it makes available or publishes any public record; however, in each case, the justification for the deletion shall be explained fully in writing.

(2) For informational purposes, each agency shall publish and maintain a current list containing every law, other than those listed in this chapter, that the agency believes exempts or prohibits disclosure of specific information or records of the agency. An agency's failure to list an exemption shall not affect the efficacy of any exemption.

(3) Each local agency shall maintain and make available for public inspection and copying a current index providing identifying information as to the following records issued, adopted, or promulgated after January 1, 1973:

(a) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(b) Those statements of policy and interpretations of policy, statute, and the Constitution which have been adopted by the agency;

(c) Administrative staff manuals and instructions to staff that affect a member of the public;

(d) Planning policies and goals, and interim and final planning decisions;

(e) Factual staff reports and studies, factual consultant's reports and studies, scientific reports and studies, and any other factual information derived from tests, studies, reports, or surveys, whether conducted by public employees or others; and

(f) Correspondence, and materials referred to therein, by and with the agency relating to any regulatory, supervisory, or enforcement responsibilities of the agency, whereby the agency determines, or opines upon, or is asked to determine or opine upon, the rights of the state, the public, a subdivision of state government, or of any private party.

(4) A local agency need not maintain such an index, if to do so would be unduly burdensome, but it shall in that event:

(a) Issue and publish a formal order specifying the reasons why and the extent to which compliance would unduly burden or interfere with agency operations; and

(b) Make available for public inspection and copying all indexes maintained for agency use.

(5) Each state agency shall, by rule, establish and implement a system of indexing for the identification and location of the following records:

(a) All records issued before July 1, 1990, for which the agency has maintained an index;

(b) Final orders entered after June 30, 1990, that are issued in adjudicative proceedings as defined in RCW 34.05.010 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(c) Declaratory orders entered after June 30, 1990, that are issued pursuant to RCW 34.05.240 and that contain an analysis or decision of substantial importance to the agency in carrying out its duties;

(d) Interpretive statements as defined in RCW 34.05.010 that were entered after June 30, 1990; and

(e) Policy statements as defined in RCW 34.05.010 that were entered after June 30, 1990.

Rules establishing systems of indexing shall include, but not be limited to, requirements for the form and content of the index, its location and availability to the public, and the schedule for revising or updating the index. State agencies that have maintained indexes for records issued before July 1, 1990, shall continue to make such indexes available for public inspection and copying. Information in such indexes may be incorporated into indexes prepared pursuant to this

subsection. State agencies may satisfy the requirements of this subsection by making available to the public indexes prepared by other parties but actually used by the agency in its operations. State agencies shall make indexes available for public inspection and copying. State agencies may charge a fee to cover the actual costs of providing individual mailed copies of indexes.

(6) A public record may be relied on, used, or cited as precedent by an agency against a party other than an agency and it may be invoked by the agency for any other purpose only if:

(a) It has been indexed in an index available to the public; or

(b) Parties affected have timely notice (actual or constructive) of the terms thereof.

(7) Each agency shall establish, maintain, and make available for public inspection and copying a statement of the actual per page cost or other costs, if any, that it charges for providing photocopies of public records and a statement of the factors and manner used to determine the actual per page cost or other costs, if any.

(a) In determining the actual per page cost for providing photocopies of public records, an agency may include all costs directly incident to copying such public records including the actual cost of the paper and the per page cost for use of agency copying equipment. In determining other actual costs for providing photocopies of public records, an agency may include all costs directly incident to shipping such public records, including the cost of postage or delivery charges and the cost of any container or envelope used.

(b) In determining the actual per page cost or other costs for providing copies of public records, an agency may not include staff salaries, benefits, or other general administrative or overhead charges, unless those costs are directly related to the actual cost of copying the public records. Staff time to copy and mail the requested public records may be included in an agency's costs.

(8) An agency need not calculate the actual per page cost or other costs it charges for providing photocopies of public records if to do so would be unduly burdensome, but in that event: The agency may not charge in excess of fifteen cents per page for photocopies of public records or for the use of agency equipment to photocopy public records and the actual postage or delivery charge and the cost of any container or envelope used to mail the public records to the requestor.

(9) This chapter shall not be construed as giving authority to any agency, the office of the secretary of the senate, or the office of the chief clerk of the house of representatives to give, sell or provide access to lists of individuals requested for commercial purposes, and agencies, the office of the secretary of the senate, and the office of the chief clerk of the house of representatives shall not do so unless specifically authorized or directed by law: PROVIDED, HOWEVER, That lists of applicants for professional licenses and of professional licensees shall be made available to those professional associations or educational organizations recognized by their professional licensing or examination board, upon payment of a reasonable charge therefor: PROVIDED FURTHER, That such recognition may be refused only for a good cause pursuant to a hearing under the provisions of chapter 34.05 RCW, the Administrative Procedure Act.

[2005 c 274 § 284; 1997 c 409 § 601. Prior: 1995 c 397 § 11; 1995 c 341 § 1; 1992 c 139 § 3; 1989 c 175 § 36; 1987 c 403 § 3; 1975 1st ex.s. c 294 § 14; 1973 c 1 § 26 (Initiative Measure No. 276, approved November 7, 1972). Formerly RCW 42.17.260.]

Notes:

***Reviser's note:** Subsection (6) of this section was renumbered as subsection (7) by 1992 c 139 § 3; and subsection (7) was subsequently renumbered as subsection (9) by 1995 c 341 § 1.

Part headings -- Severability -- 1997 c 409: See notes following RCW 43.22.051.

Effective date -- 1989 c 175: See note following RCW 34.05.010.

Intent -- Severability -- 1987 c 403: See notes following RCW 42.56.050.

Exemption for registered trade names: RCW 19.80.065.